No. 83-103

In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 246,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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Petition for Certiorari Filed July 7, 1983
Certiorari Granted November 14, 1983

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QUESTION PRESENTED

Whether Section 7 of the National Labor Relations Act Gives Striking Employees the Right to Threaten and Intimidate Nonstriking Employees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

NLRB Cases

Statutes

Legislative History

Law Review Articles and Other Citations

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 696 F.2d 931 (11th Cir. 1983). This opinion appears in the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed in this Court on July 7, 1983 at pages A1-A22.

The Decision and Order of the National Labor Relations Board ("Board") and the Decision of the Administrative Law Judge ("ALJ") are reported at 258 N.L.R.B. 908 (1981). The Board's decision appears in the printed Appendix to the Petition for Writ of Certiorari at A25-A47. The ALJ's decision appears in the Joint Appendix to the briefs on the merits filed with this Court on December 29, 1983 at JA 15-93.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. The petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 8, 1983. The Petition for Writ of Certiorari was filed on July 7, 1983. This Court granted the petition on November 14, 1983 limited to Question 1 presented by the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 ("Section 7"), provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

STATEMENT OF THE CASE

Woodkraft Division/Georgia Kraft Company ("Georgia Kraft" or "Company") appeals the Eleventh Circuit Court of Appeals' enforcement of a back pay order of the National Labor Relations Board ("Board") based on a finding that the Company violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. ("Act") when it discharged employees Landis Bishop and Jeffrey Hughes for strike misconduct. The misconduct occurred during an economic strike called by the Laborers' International Union of North America, AFL-CIO, Local 249 ("Union") in the Fall of 1979.

When the Company refused to reinstate Bishop and Hughes[1] after the strike, the Union filed charges against the Company alleging violations of Sections 8(a)(1) and 8(a)(3) of the Act. [JA 3, 4].[2] The 8(a)(3) allegations against the Company were dismissed since the ALJ found that concern for misconduct rather than anti-union animus was the motivating force in the Company's action. [JA 75]. The ALJ supported this conclusion by noting that, except for the alleged discriminatees, the Company immediately reinstated all the other strikers with no disciplinary action. [JA 44, 73]. He found a dearth of anti-union statements [JA 74], and noted that the Company

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1. Twenty-eight [JA 5] employees were named as discriminatees in the original Complaint. Both the Board and the ALJ upheld the discharge of three of these employees. The Board found that the discharges of the remaining employees violated § 8(a)(1) of the Act, imposed traditional remedies for these violations and dismissed the § 8(a)(3) charges because of no discriminatory motive on the part of the Company. This appeal involves two discharges that the ALJ upheld and the Board reversed.

2. "JA" refers to the Joint Appendix to the briefs on the merits.

was quite scrupulous in its observance of employee rights. [JA 74]. Finally, he found that it was quite clear that serious misconduct did occur culminating in a state court injunction. [JA 75].

An administrative hearing was held in July, 1980. The Administrative Law Judge ("ALJ") found that the Company did not violate the Act in discharging Bishop and Hughes because their actions were of sufficient gravity to warrant such discipline. [JA 77, 80]. He credited non-striker William Walker's testimony that Bishop and Hughes came to his home at night. They were drunk and cursing him. They told him he was "screwing them out of their G.... damn money by working during the strike." Bishop said he would "take care of him [Walker]" if he returned to work during the strike. [JA 63, 93-96]. This statement was repeated by Hughes [JA 63, 96]. Hughes called Walker a "sorry mother f.....er." [JA 63, 96]. These comments were made on Walker's front porch and in the presence of his young daughter and pregnant wife. [JA 63, 77, 95, 96].

The ALJ upheld the discharges finding, that "Bishop and Hughes . . . *threatened him with bodily injury if he returned to work.*" [JA 63, 77, emphasis added].

The Board accepted the ALJ's credited testimony but found that the actions of Bishop and Hughes constituted an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge [A40].[3] The Board concluded that the remark about "taking care of" Walker was ambiguous, and that it was unaccompanied by violence or physical gestures. [A40].

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3. "A" refers to the Appendix to the Petition for Writ of Certiorari.

A divided panel of the Eleventh Circuit issued its decision on January 24, 1983 granting enforcement of the Board's order. [A22]. The Eleventh Circuit also adopted the Board's standard that verbal threats are protected by Section 7 of the Act if not accompanied by physical acts or gestures. [A20]. The dissenting judge, in line with the other Circuit Courts of Appeals and consistent with well-established precedent of the Eleventh Circuit, refused "to join in sanctioning strike-related conduct that generates fear in a person when he is standing in the door of his home." [A21].

The Eleventh Circuit denied the petitioner's request for rehearing and suggestion for rehearing en banc on April 8, 1983. [A23-24].

This Court granted the Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit on November 14, 1983. [JA 103].

SUMMARY OF ARGUMENT

The actions of Landis Bishop and Jeffrey Hughes in making a nighttime visit to the home of a nonstriking employee, swearing at him in front of his pregnant wife and young daughter and threatening to "take care of" him are not protected by Section 7 of the Act and are sufficiently egregious to warrant discipline The Company did not violate § 8(a)(1) of the Act by discharging Bishop and Hughes for this indefensible conduct. The Company urges this Court to overrule the Eleventh Circuit Court of Appeals and deny enforcement of the back pay order.

The Board held and the Eleventh Circuit affirmed that an employer cannot discharge a striker for engaging in threats unless the threats are accompanied by physical

acts or gestures. This "overt act" test should be rejected.[4] The Third and First Circuit Courts of Appeals have discarded the Board's rule for the simple reason that threats are not protected by the Act. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3rd Cir. 1977). This Court should adopt the "objective test" propounded by the Third and First Circuit Courts and hold that threats alone which reasonably tend to coerce or intimidate employees in the rights guaranteed under the Act are not protected.

The Board's overt act standard should also be rejected because it ignores the Section 7 rights of nonstriking employees. The statute's plain language and legislative history support the conclusion that Congress intended to protect the right to refrain from engaging in concerted activities as well as the right to participate in such actions. By ordering reinstatement for strikers who threaten and intimidate nonstrikers, the Board fails to balance the equally protected rights of nonstrikers to be free from intimidation and coercion in exercising their rights to refrain from strike-related activities. This Court should reject the Board's overt act test for evaluating threats and rule that an employer does not violate Section 8(a)(1) of the Act when it discharges striking employees who threaten and intimidate nonstriking employees. Under any standard, this Court should at least draw the line on threats and intimidation away from the picket line and at employees' homes.

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4. Although the Board's judgment is entitled to deference in matters of federal labor policy and employee relations, it does not require any special expertise to identify and evaluate threats and intimidating statements. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

ARGUMENT

I. STRIKING EMPLOYEES ARE NOT PROTECTED BY SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT WHEN THEY THREATEN AND INTIMIDATE NONSTRIKING EMPLOYEES AND THEY LOSE THEIR REINSTATEMENT RIGHTS BY ENGAGING IN SUCH INDEFENSIBLE CONDUCT.

A. Section 7 Does Not Protect All Strike-Related Activities.

There is no question that the Act guarantees employees the right to lawfully organize and strike. 29 U.S.C. §§ 157 and 163. In addition Sections 8(a)(1) and 8(a)(3) of the Act make it an unfair labor practice for an employer to interfere with the exercise of these rights. To ensure that employees will not be discouraged in exercising their right to strike, an employer must reinstate employees who have engaged in an economic strike, unless they have been permanently replaced or there is a legitimate and substantial business justification. *NLRB v. Fleetwood Trailer Company*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf.* 414 F.2d 99 (7th Cir. 1969), *cert. den.* 397 U.S. 920 (1970). Despite these rights, employers may be justified in refusing to reinstate striking employees who engage in a variety of strike misconduct such as coercive or threatening acts. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763, 765 (10th Cir. 1982); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977); *Advance Industries Division-Overhead Door Corporation v. NLRB*, 540 F.2d 878, 882 (7th Cir. 1976); *NLRB v. Pepsi Cola*, 496 F.2d 226 (4th Cir. 1974).

Not all forms of conduct which fall literally within the terms of Sections 7 and 13 are entitled to statutory protection. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *Coronet Casuals, Inc.*, 207 NLRB 304 (1973). In deference to the rights of employers and the public, the Board and Courts agree that an employee who engages in serious misconduct during the economic strike gives up his right to reinstatement. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1983); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *W. J. Rusco Company v. NLRB*, 406 F.2d 725 (6th Cir. 1969); *Hedstrom Company*, 235 NLRB 1198 (1978); 29 USC § 160(c); Erickson, *Forfeiture of Reinstatement Rights Through Strike Misconduct*, 31 Lab. L. Journal 602 (October, 1980). On the other hand, the Board and the Courts recognize that not every act of impropriety committed in the course of a strike deprives an employee of the Act's protection. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *Arrow Industries, Inc.*, 245 NLRB 1376 (1979); *M. P. Industries, Inc.*, 227 NLRB 1709 (1977); *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975).

In reviewing strike misconduct cases, the Board refers to various, albeit related standards, for specific types of misconduct. When the misconduct involves threats to nonstriking employees, the test generally followed by the Board is that an employer is not entitled to discharge a striker for threats unless the threats are accompanied by physical acts or gestures. *See, A. Duie Pyle, Inc.*, 263 NLRB 744 (1982); *Arrow Industries, Inc.*, 245 NLRB 1376 (1979); *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975); *Valley Oil Company*, 210 NLRB 370 (1974); *Capitol Rubber and Specialty Company*, 201 NLRB 715 (1973); Cabot & Jarin, *The Third Circuit's New Standard For Strike Mis-*

conduct Discharges: NLRB v. W. C. McQuaide, Inc., 23 Vill. L. Rev. 645 (1977-78).

The Third and First Circuit Courts have expressly rejected the Board's test that overt acts are needed in addition to the threats. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3rd Cir. 1977). The Eleventh Circuit is the first Court to accept the Board's overt act test which has created a conflict among the Circuits.

The question presented to this Court is whether Section 7 of the Act gives striking employees the right to threaten and intimidate nonstriking employees. More specifically, the issue is whether the Board under any standard should be allowed to protect profane threats by intoxicated strikers made at the homes of nonstriking employees in front of their families.

B. The Board's Test for Evaluating Threats by Striking Employees Should Be Rejected Because It Is Erroneous As a Matter of Law.

In the case before this Court, the ALJ denied reinstatement to Landis Bishop and Jeffrey Hughes after finding that the two intoxicated strikers made a nighttime visit to the home of a nonstriking employee, William Walker, swore at him and threatened him with bodily injury in the presence of his young daughter and pregnant wife. [A67]. The Board overruled the ALJ, finding the threats "to take care of" Walker to be "ambiguous" and not sufficient to warrant discharge since the threats were unaccompanied by physical acts or gestures. [A40]. The Eleventh Circuit specifically adopted the NLRB's overt act test and enforced the Board's order. Judge Clark dissented and refused "to join in sanctioning strike-related conduct that can gen-

erate fear in a person when he is standing in the door of his home." [A22].

The Board's judgment that only those threats accompanied by physical acts or gestures lose the protection of the Act is misguided. Threats, alone, are not protected by the Act. *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3rd Cir. 1977).[5] The Third Circuit rejected the Board's overt act test because it stated an erroneous rule of law and held:

> We recognize that some confrontations between strikers and non-strikers are inevitable and that not every impropriety is grounds for discharge. Moreover, we recognize that it is the primary responsibility of the Board and not the Courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights.' [Citations omitted.] Yet, we do not believe that the employer must countenance conduct that amounts to intimidation and threats of bodily harm. Threats are not protected conduct under the Act, and we fail to see how a threat acquires protected status simply because it is unaccompanied by physical acts or gestures. The question is whether a threat is sufficiently egregious, not whether there is added emphasis.

NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 527 (3rd Cir. 1977).

In *McQuaide*, the ALJ found that striking employee Lavely threatened three individuals on separate occasions.

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5. *See*, discussion 552 F.2d at 527. *See, also*, Cabot & Jarin, *The Third Circuit's New Standard for Strike Misconduct Discharges: NLRB v. W. C. McQuaide, Inc.*, 23 Vill. L. Rev. 645, 653-654 (1977-1978); Thiblot & Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB*, 326-327 (1983).

Lavely followed nonstriker King to a delivery point and said he would "get him". Later, Lavely shook his fists at employee Ingston as he drove across the picket line and called him a scab and said he would "knock the . . . shit out of him" if he drove any longer. In addition, Lavely told truck driver Harris "you are going to get yours". The Board found that employee Lavely's threats were protected since the language was not accompanied by any physical acts or gestures that would provide added emphasis or meaning to their words sufficient to warrant the finding that he should not be reinstated to his job at the strike's conclusion. *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975). In refusing to enforce the Board's reinstatement order, the Third Circuit stated that substantial evidence on the record indicated that Lavely's conduct constituted threats which could reasonably tend to coerce or intimidate.

In rejecting the Board's test, the First Circuit also found the Board's overt act requirement to be misplaced.

> The Board's formula . . . is too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity. A serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker. *Associated Grocers of New England v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977).

The Third and First Circuits adopted the following objective standard for determining when threats and intimidation by individual strikers lose the protection of Section 7:

> Whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act.

Associated Grocers of New England v. NLRB, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 528 (3rd Cir. 1977).

In announcing this objective test, the Third Circuit noted that some Courts have used a subjective approach to evaluate threats by focusing on the effect on the victim. *NLRB v. EFCO Manufacturing Co.*, 227 F.2d 675, 676 (1st Cir. 1955), *cert. denied* 360 U.S. 1007 (1955); *NLRB v. Trumball Asphalt Co.*, 327 F.2d 841, 846 (8th Cir. 1964). The Court noted that the difficulty with a subjective analysis is that it does not focus on the conduct of the striker. *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 at 528. The test of coercion and intimidation should not be whether the conduct proves effective. Under a subjective test, strikers could threaten with impunity so long as the victim was particularly courageous.

Other Courts have drawn the line at conduct that is *intended* to threaten or intimidate nonstrikers. *NLRB v. Pepsi Cola Company*, 496 F.2d 226 (4th Cir. 1974); *NLRB v. Hartmann Luggage Co.*, 453 F.2d 179 (6th Cir. 1971). The difficulty with this approach is that even threats to kill can be dismissed as mere picket line rhetoric or "animal exuberance" not literally intended.

The objective test followed by the Third and First Circuits is a reasonable and balanced approach. It provides a far more appropriate guide than the Board's overt act test or the various subjective analyses in determining whether a threat, with or without more, is sufficiently egregious to justify an employer refusing to reinstate the wrongdoer.

The error in the Board's reasoning is illustrated in *A. Duie Pyle, Inc.*, 263 NLRB 744 (1982). In *A. Duie Pyle* the Board, while acknowledging criticism by the Courts of

Appeals, continued to apply its overt act test. The ALJ found that a striking employee's obscene threats to burn down the house of a nonstriker was sufficiently serious conduct to render him unfit for future performance. In commenting on the Board's overt act requirement, the ALJ noted that a threat of arson cannot be reasonably accompanied by physical acts or gestures. The Board reversed the ALJ, flatly stating that an employer cannot discharge a striker for engaging in threats unless the threats are accompanied by physical acts or gestures. 263 NLRB at 745. The Board noted that the striking employee shouted "Givler, your house is on fire," and "if it is not now, it will be Saturday." The Board also noted that the striker repeated the first remark about Givler's house being on fire twice more within the next few minutes and called Givler a bastard. The Board stated that "we find that Touchton's picket line threat, while ill-considered *and not to be condoned*, was not sufficiently egregious to deny Touchton reinstatement." 263 NLRB at 745. (Emphasis added.) The Board is simply unwilling to recognize the contradiction in finding specific conduct not to be condoned, yet ordering the company to condone that very conduct by reinstating the employee.

Chairman Van DeWater vigorously dissented from the *A. Duie Pyle* holding and concluded that discharge was plainly justified. Couching his dissent in terms of the Board test, he concluded that "Touchton's threat was the coercive equivalent of the physical acts and gestures required by the Board to support the discharge of a striker for threats or verbal abuse to a nonstriker." 263 NLRB at 747. This forced construction of the Board's overt act test is not necessary to achieve a correct result. The objective test would simply acknowledge that threats alone can be intimidating and coercive.

This Court should reject the Board's overt act test and adopt the objective standard of the Third and First Circuits.[6] In accepting the Board's rule, the Eleventh Circuit noted that the Board is ordinarily entitled to deference in determining the scope of activity protected under Section 7 of the Act. *Georgia Kraft Co. v. NLRB*, 696 F.2d 931 (11th Cir. 1983) [A19]. This principle should not apply here since it does not take any special expertise in industrial relations to identify threatening and intimidating remarks.

Under this objective test, it is respectfully suggested that this Court find that the actions of Landis Bishop and Jeffrey Hughes reasonably tended to coerce William Walker in the exercise of his protected rights to work during the strike and refrain from engaging in strike-related activities. As the ALJ found, under the circumstances, Mr. Walker was reasonably in fear of bodily harm and was reasonably intimidated by Mr. Hughes and Mr. Bishop. The threats to Walker were not in isolation. The ALJ found that "serious misconduct did occur" during the strike including "rather widespread acts of violence and near violence, culminating in [a] state court injunction. . . ." [JA 75]. Under any circumstances, repeatedly threatening a non-striker with bodily harm at his home at night in the presence of his wife and child is sufficiently egregious conduct to justify disciplinary action. This Court should join Judge Clark in refusing to sanction strike-related conduct that can generate fear in a person when he is standing in the door of his home.

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6. In addition, a divided panel of the Tenth Circuit Court of Appeals recently avoided adopting or rejecting the Board's test by noting that the employer's refusal to reinstate in that case would not have met the objective standards of either the Third and First Circuits either. The dissent argued that the Court should address the issue and clearly adopt the standard set forth by the First and Third Circuits. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982).

C. The Board's Test Should Also Be Rejected Because It Fails to Recognize the Section 7 Rights of the Nonstriking Employees to Refrain From Engaging in Concerted Activities.

In *NLRB v. Fleetwood Trailer Company*, 389 U.S. 375 (1967), this Court stated that it is the primary responsibility of the Board to strike the proper *balance* between the employer's asserted business justifications for refusing to reinstate strikers and the invasion of the employees' Section 7 rights to organize and strike. 389 U.S. at 378; 29 U.S.C. § 157. This Court has never addressed the question of whether the rights of nonstriking employees weigh in the balance. The Board has failed to resolve this issue. The Board has repeatedly supported threats by strikers against nonstriking employees, without considering the equal rights of nonstriking employees to be free from restraint and coercion in exercising their Section 7 rights to refrain from striking or other activities. 29 U.S.C. § 157.

The statutory language is clear. "Employees . . . shall also have the right to refrain from any or all of such activities [the right to self-organization, to form, organize, or assist labor organizations . . . and to engage in other concerted activities . . .]". 29 U.S.C. § 157.

The legislative history makes clear that the 1947 Amendments to Section 7 were offered for the sole purpose of equalizing the legal rights and responsibilities of employers, labor organizations, and employees. H. R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act. 1947, at 318 (1948); S. Rep. No. 105, 80th Cong., 1st Sess. 1 (1947), *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 407 (1948); 93 Daily Cong. Rec. 3550, April 15, 1947; 4261, April 28,

1947; 4558, 4561, 4563, May 2, 1947, *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 640; 1067; 1198-1199, 1203-1204, 1206, 1207 (1948).

In the congressional debate over the 1947 amendments, Senator Ball addressed the plight of those employees wishing to refrain from participating in union activities. Senator Ball noted that employees were forced to endure visits to their homes and threats that they would be taken care of. He concluded that "It seems to me individual employees in the free exercise of their rights guaranteed by this Act are just as much entitled to protection from such activities of unions as they are from the same kind of coercive activities on the part of employers."[7] Both the House Committee Report and the Conference Report explained that the Section 7 Amendment would grant employees the right to refrain from joining or engaging in concerted activities with their fellow employees if they do not wish to do so.[8]

Senator Smith, co-sponsor of the 1947 legislation, described Section 7 as the key section in rectifying the imbalance in the original Act.[9] The concern for protecting the rights of employees to be able to refrain from union activities was underscored by the 1947 amendment adding Section 8(b)(1) to the Act. Complementing Section 7, Section 8(b)(1) was proposed to make it an unfair labor prac-

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7. 93 Daily Cong. Rec. 4558, May 2, 1947, *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1199-1200 (1948).

8. H. R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947) and H. R. Rep. No. 510, 80th Cong., 1st Sess. 40 (1947), *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 318, 544 (1948).

9. 93 Daily Cong. Rec. 4561, May 2, 1947, *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1204 (1948).

tice for a union to restrain or coerce employees in the exercise of their guaranteed Section 7 rights.[10] In debate, Senator Taft, sponsor of the legislation, explained that these complementary provisions were necessary "if we wish to secure the equality which the bill aims to give as between employers and employees." Id. Senator Taft acknowledged that unions had threatened employees. Noting that the law prohibits employers from threatening employees, Taft explained that the 1947 amendments did nothing more than bind the union in the same way. Id. In debating the implications of the proposed Sections 7 and 8(b)(1), Senator Taft explained that the legislation would not outlaw or limit any employee's right to strike. However,

> It would outlaw threats against employees. It would not outlaw anybody's striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.[11]

In a supplementary analysis of the Amendments as proposed following conference debate, Senator Taft noted that the express language of Sections 7 and 8(b)(1) would prohibit "coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line."[12]

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10. 93 Daily Cong. Rec. 4142, April 25, 1947, *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1025 (1948).

11. 93 Daily Cong. Rec. 4563, May 2, 1947, *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1207.

12. 93 Daily Cong. Rec. 7000, June 12, 1947, *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 1623 (1948).

By allowing employees to threaten and intimidate nonstriking employees, absent physical acts or gestures the Board and the 11th Circuit proceed on the erroneous assumption that the "protection of the Act" immunizes strikers from the consequences of such indefensible activity. Because of the Board's preoccupation with protecting the right to strike and issuing reinstatement orders, it ignores the equally protected rights of nonstrikers not to engage in such activities. Consequently, the Board characterizes threats as minor misconduct, animal exuberance, or "boys will be boys." The Board's rationale is not correct since it fails to strike any balance whatsoever. Section 10(c) of the Act states that the Board cannot order reinstatement or back pay for an individual discharged for cause. 29 U.S.C. § 160(c). Although Section 10(c) does not allow an employer to discharge an employee for engaging in protected concerted activities, Congress and this Court have long recognized that Section 7 does not protect *all* strike-related activities:

> The courts have firmly established the rule that under the existing provisions of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct.

NLRB v. Electrical Workers, 346 U.S. 464, 473, 474 (1953), quoting from H. R. Rep. No. 510, 80th Cong., 1st Sess. 38-39. *See also, NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

In *NLRB v. Washington Aluminum Company*, 370 U.S. 9 (1962), the Court identified as unprotected those activities that are "unlawful, violent or in breach of contract." 370 U.S. 9, 17 (1962). *Southern Steamship Company v. NLRB*, 316 U.S. 31 (1942); *NLRB v. Sands Manufacturing Company*, 306 U.S. 332 (1939); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

In *NLRB v. Electrical Workers*, 346 U.S. 464 (1953), the Court denied the protection of Section 7 to activities characterized as "indefensible" because they were found to show a disloyalty to the worker's employer which this Court considered unnecessary to carry on the workers' legitimate concerted activities. *Id.* at 477; *Washington Aluminum Company v. NLRB*, 370 U.S. 9, 17 (1962). Georgia Kraft contends that threatening and intimidating nonstriking employees is indefensible and unprotected under the Act. Protecting such conduct is not necessary to effectuate the legitimate goals of striking employees.

The Court of Appeals recognize that the right of nonstriking employees to continue to work is a basic right guaranteed by the Act. *See, e.g., NLRB v. Community Motor Bus Company*, 439 F.2d 965 (4th Cir. 1971). In an effort to balance the rights of striking and nonstriking employees, the Courts of Appeals have frequently held that strikers may attempt to persuade nonstrikers by proper means to join their protest, but such efforts must be confined within reasonable limits if the strikers are to be protected in their right to reinstatement to their former position. *NLRB v. Pepsi Cola*, 496 F.2d 226 (4th Cir. 1974); *W. J. Rusco Company v. NLRB*, 406 F.2d 725, 727 (6th Cir. 1969).

In *NLRB v. Pepsi Cola*, 496 F.2d 226 (4th Cir. 1974), the Court found, contrary to the Board, that a striking employee's implied threats to a prospective job seeker went beyond those reasonable limits. In that case, striking employee Taylor approached a car where a prospective job seeker and his wife were sitting, stuck his head in the window and said, "I know where you live, and if you go in there to work, I'll come looking for you." The job seeker left the premises. In refusing to condone such conduct, the Court expressly rejected the Board's assess-

ment that the threat was not of such a nature as to warrant Taylor's disqualification for reinstatement. The Court rejected the Board's apparent distinction between Taylor's threats and a specific threat of physical harm stating simply, "we cannot agree that a veiled threat is substantially different from one delivered with less subtlety." 496 F.2d at 229.

In addition to narrowly defining what constitutes an unprotected threat, when it finally finds one, the Board often distinguishes it away. As illustrated by the *Georgia Kraft* case, the Board will combine its "overt act" test with an isolated act principle to characterize threats as minor misconduct. *Georgia Kraft Company*, 228 NLRB 908, 913 (1981) [A40]. *See also, Arrow Industries, Inc.*, 245 NLRB 1376 (1979). The isolated act test is bankrupt. A single threat can restrain or coerce an employee in exercising his right to refrain from strike or union-related activities. Would Bishop and Hughes' nighttime threats to William Walker delivered at his home in front of his family have been more intimidating to Walker if they had threatened someone else first?

The Board also trivializes threats by calling them ambiguous. Fortunately, the Courts have repeatedly refused to endorse the Board's efforts. In *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971), a striking employee approached the car of a nonstriking employee as he crossed the picket line and began to curse him and told him that if he "did anything he was going to get my . . . ass." The nonstriking employee's wife and child were with him in the car. The trial examiner concluded that this was a threat of physical harm and constituted serious misconduct warranting termination. The Board rejected the trial examiner's conclusion and characterized the remark as "vague and ambiguous." In denying enforcement,

the Fifth Circuit acknowledged the circumscribed review allowed by *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) but stated, "We are unable to find substantive evidence to justify the Board's interpretation—in opposition to its Trial Examiner—of Whitehead's remarks and related activities." 449 F.2d at 512.

In *NLRB v. Moore Business Forms*, 574 F.2d 835 (1978) the Fifth Circuit again refused to enforce a Board order to reinstate a striking employee who retorted, "There's ways to keep you from it" when a nonstriking employee informed him that he was going to work. This encounter took place in the daytime at the plant site and there was no allegation that the remark was accompanied by any physical act or gestures. In refusing to enforce the Board's Order, the Fifth Circuit specifically rejected the Board's characterization of this threatening comment as "ambiguous."

In *Georgia Kraft*, Judge Hatchett distinguishes *Moore Business Forms* on the meritless ground that the record in *Georgia Kraft* shows that violent acts were only committed against property and not against persons. This after-the-fact distinction is incorrect and is little comfort to the *person* being threatened at home by two intoxicated strikers. In *Georgia Kraft* the ALJ found widespread acts of violence including rock throwing and pointing a gun at the plant manager. The ALJ noted the Company had a genuine problem that culminated in a state court injunction. [JA 75].

What the Board overlooked in *Georgia Kraft* is that Landis Bishop and Jeffrey Hughes were *not* engaged in minor acts of misconduct. Using unlawful and unprotected means, Bishop and Hughes interfered with a basic right protected by the Act—the right of a nonstriking employee to refrain from engaging in concerted activities.

In support of its decision in the *Georgia Kraft* case the Board cited yet another instance where it ignored the nonstriking employee's right to refrain from concerted activities and approved a striking employee's traveling to the home of a nonstriking employee to threaten and intimidate her. *M. P. Industries, Inc.*, 227 NLRB 1709, 1710-11 (1977). In *M. P. Industries*, pickets Barrow and Walter followed strike replacement Debby Wentworth to her house. When the strikers reached Wentworth's home, Barrow and Walker told Wentworth, "You had better watch it, Debby. We know where you live." They also asked Wentworth where her father (who had been crossing the picket line and driving her to and from work) worked. After she told them where he worked, they asked if he was in a union. When she replied that she thought so, they said, "Well, that's nice to know." 227 NLRB 1709, 1711, 1717. The ALJ noted that Wentworth called the police and asked them to keep an eye on her and her house that night. 227 NLRB at 1717. The ALJ found that they intended to intimidate her, and further noted that there is no evidence that they could not have appealed to her on the picket line. He stated, "Such intimidation at the home site was serious misconduct sufficient to justify [discipline] . . . The Act does not shield them from such discipline simply because they were engaged in union activity at the time." 227 NLRB at 1717. In overruling the ALJ, the Board did not express any concern at all that the intimidation took place at an employee's home. The Board gave its usual justification that "a single isolated threat, unaccompanied by any violence, is not conduct of a sufficiently serious character as to remove an employee from the protective mantle of the Act." 227 NLRB at 1711.

The Board's overt act test is erroneous as a matter of law since it condones striking employees' threats and inti-

midation in contravention of the purposes of the Act. By requiring employers to reinstate employees who have threatened their fellow workers, the Board is not promoting industrial peace. In failing to recognize the equal rights of nonstriking employees to be free from fear and intimidation the Board's "overt act" requirement does not "fall . . . within that category of situations in which the Courts should defer to the agency's understanding of the statute which it administers". *NLRB v. Pipefitters Local 638*, 429 U.S. 507, 528 (1977). This Court should at least rule that an employer does not violate the Act when it discharges striking employees who intimidate and coerce nonstriking employees at their homes while they are exercising their equal rights to refrain from engaging in concerted activities.

CONCLUSION

For the reasons stated, Petitioner Woodkraft Division/Georgia Kraft Company respectfully requests this Court overrule the Decision of the Eleventh Circuit Court of Appeals concluding that the Company violated Section 8(a)(1) of the National Labor Relations Act when it refused to reinstate striking employees Landis Bishop and Jeffrey Hughes and deny enforcement of the National Labor Relations Board's Back Pay Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. Roy Weathersby, do hereby certify that I have this day served the within and foregoing Brief for Petitioner by mailing three copies thereof in envelopes properly stamped and addressed as follows:

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